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No. 86-818

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FALCON INSURANCE COMPANY
and
MUTUAL FIRE, MARINE AND INLAND INSURANCE COMPANY.

Petitioners,

v.

ELI LILLY AND COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Pursuant to Rule 22.5 of the rules of this Court, petitioners submit this Reply to the Respondent's Brief in Opposition.

I

As its primary ground advanced for denying the Petition herein, respondent argues that no constitutional issue is involved because a non-constitutional

basis exists upon which the judgment of the court below can be affirmed. Opposition at 4-9. In so doing, respondent merely seeks to relitigate in this Court issues upon which the court below explicitly did not rely in reaching its judgment. As explained in some detail in its opinion, the court below concluded that it could not base its judgment on the consent or waiver arguments petitioner now advances. Petition Appendix at 13a-19a. Instead, its affirmation of personal jurisdiction over petitioners rests squarely and exclusively on constitutional due process grounds. Petition Appendix at 19a-21a.[1] Thus, this is simply not comparable to the situation in which this Court, if presented with alternate grounds for passing upon a lower court's judgment, will avoid deciding a constitutional issue unnecessarily.

Moreover, no serious contention can be made that Mutual Fire has waived its claim that personal jurisdiction is lacking. In making this argument, Opposition at 8, respondent misrepresents the language of the district court stipulation by omitting those words that make clear that Mutual Fire agreed to be bound by "whatever final order is entered in this declaratory judgment action *as to the triggering language*" of the insurance policies involved in the litigation. Opposition Appendix at 1a (emphasis added). Mutual Fire did not

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[1] *Black v. Cutter Laboratories*, 351 U.S. 295 (1956), cited by respondents in support of this argument, has nothing to do with the situation involved here. In that case, it was clear that the decision of the Supreme Court of California, sought to be reviewed by this Court, did not rest on a basis which presented a substantial federal question. 351 U.S. at 298-300. In the instant case, the court below could not have been more clear that it was *not relying* on any basis *other than* the due process clause in affirming personal jurisdiction. Petition Appendix at 19a.

stipulate, as did the respondent in the *Petrowski v. Hawkeye-Security Insurance Co.*, 350 U.S. 495 (1956), that it would voluntarily submit to the jurisdiction of the district court without service of process, the same as if personal service had been obtained.[2]

II

Respondent's argument that due process has been served in this case is equally flawed. Contrary to the many decisions of this Court, respondent would essentially ignore the relationship of a defendant-insurance company with the forum and would focus instead upon the relationship among the plaintiff-insured, the forum, and the litigation.[3] However, this Court has made plain that, in determining the constitutional sufficiency of a party's minimal contacts for personal jurisdiction purposes, a court must focus on the relationship among the *defendant*, the forum and the

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[2] Respondents misstate this Court's holding in the *Petrowski* case in a vain attempt to apply its principle here: "While the language of one of those stipulations did expressly mention personal jurisdiction, this Court observed that the other stipulations as well supported its conclusion that the insurer had waived the personal jurisdiction issue." Opposition at 8 n.8. What this Court actually said was that "[T]he respondent, by its *stipulation* [explicitly submitting to the district court's jurisdiction and quoted by the Court in its opinion], waived any right to assert a lack of personal jurisdiction over it." 350 U.S. at 496 (emphasis added).

[3] Respondent in effect suggests that a special constitutional due process rule should apply to insurance company defendants, arguing that the question presented by this petition is not of sufficient general importance to warrant this Court's review, since a constitutional due process issue seldom arises because of the nature and form of business liability insurance policies generally. Opposition at 14-15 n.12.

litigation. See, *e.g.*, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *Rush v. Savchuk*, 444 U.S. 320 (1980); *Shaffer v. Heitner*, 433 U.S. 186 (1977). *See also*, the lower court decisions listed in the Petition at 14 n.7. No special rule has been created by this Court for insurance company defendants, and if respondent is suggesting that this Court do so, then it argues for grant of the Petition, not its denial.

III

Finally, the conflict between the decision below and *United Farm Bureau Mutual Insurance Co. v. U.S.F.&G.*, 462 A.2d 1300 (Pa. 1983) is real. Petition at 18-19. The holding that Pennsylvania could not constitutionally exercise personal jurisdiction over the non-resident insurance company did not, as respondent argues, turn on the court's concerns about the extraterritorial assertion of substantive law. To be sure, those concerns are voiced. But for, purposes of this Court's consideration of the Petition, they stand in the same place as did the concerns of the Supreme Court of California in *Black v. Cutter Laboratories* in which, as respondent has so aptly pointed out, this Court said that it reviews judgments, not statements in opinions. 351 U.S. at 297; Opposition at 8.

IV

For all of the reasons set forth in the Petition and in this Reply, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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